REDACTED – FOR PUBLIC INSPECTION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
CenturyLink's Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain *Computer Inquiry* Requirements on Enterprise Broadband Services	))))	WC Docket No. 12-60

CENTURYLINK PETITION FOR FORBEARANCE

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EXECUTIVE SUMMARY

Over the past three years, the Commission has steadily focused on the goal of accelerating the availability and quality of broadband services in America -- "the great infrastructure challenge of the early 21st century." In adopting the National Broadband Plan, the Commission recognized the need for policies that would facilitate both private sector investment in wired and wireless networks and technologies, and competition among broadband providers. In this petition, CenturyLink seeks modest action by the Commission that will further both policies. The requested forbearance will enable CenturyLink to provide enterprise broadband services, such as Ethernet services, through the simple, uniform commercial arrangements purchasers of those services seek -- the same arrangements that CenturyLink's competitors already offer today.

CenturyLink's enterprise broadband services currently are subject to a disjointed set of regulations that vary depending on the CenturyLink affiliate that provides those services. This disparate regulation -- and, particularly, lingering dominant carrier regulation and *Computer Inquiry* tariffing requirements -- precludes CenturyLink from entering into the streamlined arrangements that purchasers of these services demand in today's competitive marketplace. Such purchasers include wireless providers seeking Ethernet services to increase backhaul capacity to thousands of cell sites, in order to keep up with exploding demand for, and extend the reach of, mobile broadband services.

The requested forbearance will remove this artificial, and plainly unnecessary, roadblock to broadband deployment and competition. It will permit CenturyLink to provide simple, customized nationwide offerings of its enterprise broadband services across its operations, in competition with other providers, including market leaders AT&T and Verizon. By enabling CenturyLink to compete more effectively, and eliminating its tariffs as a pricing umbrella, forbearance will also put downward pressure on prices for these services. In these ways, the requested relief will genuinely benefit all customers, while furthering the goals articulated in the National Broadband Plan and the Commission's initiative to eliminate outmoded and excessively burdensome regulations.

The requested forbearance is fully consistent with the Commission's precedent. Enterprise broadband services are unlike other services offered by incumbent local exchange carriers (ILECs). The Commission has consistently found that the market for these services is unquestionably competitive. It has found that ILECs are not dominant in this market. It has found that outdated monopoly regulation of these services is unnecessary to protect consumers, and in fact hampers competition. It has found, in a long series of orders, that forbearance from dominant carrier regulation is appropriate for these services. This petition asks the Commission to do nothing more than extend those findings to portions of CenturyLink's operations that have, to date, not received that forbearance.

As the Commission correctly predicted in granting such forbearance to Embarq and Qwest (as well as AT&T, ACS of Anchorage and Frontier), elimination of dominant carrier regulation permits a carrier to respond more quickly to competing service offerings and meet customer requests for arrangements specifically tailored to their individualized needs. Indeed, legacy Embarq and Qwest have entered into approximately 270 commercial agreements with enterprise customers -- agreements that are individually negotiated in a way that could never be done through standardized tariff offerings. Since that time, the average prices for the services covered by those forbearance petitions have declined substantially. With this petition, CenturyLink seeks to extend the customer benefits of ending unnecessary regulation across the entirety of the post-merger company, in line with other providers of enterprise broadband services.

The requested relief easily satisfies the statutory criteria for forbearance: (1) neither dominant carrier regulation, nor the *Computer Inquiry* tariffing requirement, is necessary to ensure just, reasonable and nondiscriminatory rates for enterprise broadband services, particularly given that more than 30 providers offer these services on a national or regional basis today; (2) such regulation also is not necessary to protect purchasers of these services, and in fact precludes them from obtaining the simple, individualized serving arrangements that they demand for these services; and (3) granting the petition will further the public interest by facilitating the deployment of wired and wireless broadband services, enhancing competition and eliminating outmoded and excessively burdensome regulation.

The petition would have no impact on the Commission's regulation of DS1 and DS3 services or the Commission's pending review of special access regulation. CenturyLink likewise will continue to be subject to the remaining requirements of Title II, including general common carrier obligations and section 208 complaint procedures.

Given that this petition raises no new issues of law or fact, the Commission should grant it expeditiously, and can do so through delegated authority.

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CENTURYLINK PETITION FOR FORBEARANCE

I. INTRODUCTION

Pursuant to section 10 of the Telecommunications Act of 1996, and sections 1.53 and 1.54 of the Commission's rules,[1] CenturyLink hereby petitions the Commission for forbearance from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to its packet-switched and optical transmission services (hereinafter, "enterprise broadband services") that are still subject to those obligations.[2]

CenturyLink's enterprise broadband services currently are subject to a disjointed set of regulations that vary depending on the CenturyLink affiliate that provides those services. While most of legacy Embarq and Qwest's enterprise broadband services are detariffed, all such services provided by legacy CenturyTel are subject to dominant carrier regulation, including tariff requirements and full price cap regulation. This disparate regulation precludes CenturyLink from entering into the streamlined arrangements that purchasers of these services demand in today's competitive marketplace. Such purchasers include wireless providers seeking

[1] 47 C.F.R. §§ 1.53, 1.54.

[2] CenturyLink seeks forbearance from both dominant carrier regulation and certain *Computer Inquiry* requirements that otherwise apply to the specified enterprise broadband services. For convenience, CenturyLink sometimes refers to this request as seeking "nondominant treatment" for these services.

Ethernet services to increase backhaul capacity to thousands of cell sites, in order to keep up with exploding demand for, and extend the reach of, mobile broadband services.

CenturyLink is well qualified to offer such services over its expansive footprint, which includes many rural areas. In too many cases, however, CenturyLink's inability to offer simple, customized arrangements has led customers to dismiss CenturyLink as a potential provider of these services. In others, even where CenturyLink has won the customer, it has required needlessly complicated transactions that vainly attempt to emulate the straightforward, uniform arrangement truly sought by the customer. In either case, continuing dominant carrier regulation frustrates customers' desired serving arrangements -- potentially slowing the deployment of broadband services -- and imposes inefficient, outdated regulation in a dynamic, competitive marketplace.

The requested forbearance will further the goals articulated in the National Broadband Plan by allowing CenturyLink to provide enterprise broadband services through the simple, uniform commercial arrangements purchasers of those services seek -- the same arrangements that CenturyLink's competitors offer today.[3] By enabling CenturyLink to compete more

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[3] For example the Plan expressed the goal that by 2020, the United States would "lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation." National Broadband Plan (2010) at 25. Achievement of this goal obviously depends heavily on the availability in all areas of robust backhaul networks. More recently, the Commission overhauled the universal service and intercarrier compensation systems "to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation." *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform - Mobility Fund,* WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking,

effectively, and eliminating its tariff as a pricing umbrella, forbearance will also put downward pressure on prices for these services. Forbearance additionally will enable the post-merger company to compete most effectively for enterprise and government customers against other providers, including market leaders AT&T and Verizon. In these ways, the requested relief will genuinely benefit all customers.

Forbearance from the regulatory provisions in question -- dominant carrier regulation and the *Computer Inquiry* tariffing requirement -- also will further the Commission's initiative to eliminate outmoded and excessively burdensome regulations, consistent with Executive Order 13579.[4] This relief meets each of the factors the Commission considers to identify regulations that have outlived their usefulness.[5]

The requested forbearance is fully consistent with the Commission's precedent. More than four years ago, the Commission granted identical relief to AT&T, ACS of Anchorage, Embarq, Frontier and Qwest in the *Enterprise Broadband Forbearance Orders*.[6] In doing so, the Commission found that the market for enterprise broadband services is highly competitive, and that dominant carrier regulation is therefore unnecessary and ill-suited for those services. This

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FCC 11-161 ¶ 1 (rel. Nov. 18, 2011) (*USF/ICC Transformation Order*), *Order clarifying rules* (*Clarification Order*), DA 12-147, rel. Feb. 3, 2012, Erratum, rel. Feb. 6, 2012; *pets for recon. pending*; *pets. for rev. of the Report and Order pending, sub nom. Direct Communications Cedar Valley, et al. v. FCC*, (10th Cir. Nos. 11-9581, *et al.*).

[4] *See Preliminary Plan for Retrospective Analysis of Existing Rules* (rel. Nov. 7, 2011).

[5] *See id.* at 7.

[6] Through operation of law, Verizon's enterprise broadband services also are free from dominant carrier regulation. *See* FCC News Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law* (rel. Mar. 20, 2006).

petition asks the Commission to do nothing more than extend those findings to portions of CenturyLink's operations that have, to date, not received that forbearance.

In the *Enterprise Broadband Forbearance Orders,* the Commission predicted that elimination of dominant carrier regulation would permit Embarq and Qwest to respond more quickly to competing service offerings and meet customer requests for arrangements specifically tailored to their individualized needs. That is exactly what has occurred. Legacy Embarq and Qwest have entered into approximately 270 commercial agreements with enterprise customers -- agreements that are individually negotiated in a way that could never be done through standardized tariff offerings. Since that time, the average prices for the services covered by those forbearance petitions have declined significantly. With this petition, CenturyLink seeks to extend the customer benefits of ending unnecessary regulation across the entirety of the post-merger company, in line with other providers of enterprise broadband services.

The requested relief easily satisfies the statutory criteria for forbearance:[7]

(1) Neither dominant carrier regulation, nor the *Computer Inquiry* tariffing requirement, is necessary to ensure just, reasonable and nondiscriminatory rates for enterprise broadband services. On the contrary, this outmoded regulation harms competition, as the Commission has repeatedly found;

(2) Such regulation also is not necessary to protect purchasers of these services, and in fact precludes them from obtaining the simple, individualized serving arrangements that they demand for these services; and

(3) Granting the petition will further the public interest by facilitating the deployment of wired and wireless broadband services, enhancing competition and eliminating outmoded and excessively burdensome regulation.

[7] *See* 47 U.S.C. § 160(a).

The petition would have no impact on the Commission's regulation of DS1 and DS3 services or the Commission's pending review of special access regulation. CenturyLink likewise will continue to be subject to the remaining requirements of Title II, including general common carrier obligations and section 208 complaint procedures.

Given that this petition raises no new issues of law or fact, the Commission should grant it expeditiously, and can do so through delegated authority.

II. BACKGROUND

CenturyLink seeks the same uniform nondominant regulation of its enterprise broadband services that applies to those services provided by other ILECs and CLECs alike, in order to provide customers the individually tailored contractual arrangements they seek.

A. Unlike CenturyLink, Other Major Providers of Enterprise Broadband Services Are Uniformly Regulated as Nondominant with Respect to Those Services.

With the exception of CenturyLink, the major providers of enterprise broadband services are uniformly regulated as nondominant with respect to the provision of those services. Following the grant of Verizon's forbearance petition by operation of law in 2006,[8] the Commission issued a series of orders forbearing from dominant carrier regulation and certain *Computer Inquiry* rules with respect to the enterprise broadband services provided at that time by AT&T, ACS of Anchorage, Embarq, Frontier and Qwest.[9] Through these orders, the

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[8] *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (2006).

[9] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with*

Commission deliberately put these ILECs on similar regulatory footing with non-ILEC providers of these services, which were already regulated as nondominant.

B. In Contrast, CenturyLink's Enterprise Broadband Services Are Subject to Widely Varying Regulation, Which Undermines CenturyLink's Ability to Compete Effectively.

Today, an enterprise broadband service provided by CenturyLink may be subject to nondominant regulation, pricing flexibility or full price cap regulation, all depending on which CenturyLink ILEC affiliate -- Legacy Qwest, Embarq or CenturyTel -- provides that service. Legacy Qwest is able to offer customers individually-tailored commercial agreements for virtually all of its enterprise broadband services, free from tariff and other dominant carrier regulation. Legacy Embarq can provide its customers similar flexibility with respect to most of its enterprise broadband services, but not for Ethernet Virtual Private Line (EVPL), its most popular Ethernet service. That is because Embarq did not offer EVPL service at the time the Commission granted Embarq forbearance in 2007. Thus, even though it is actually a new entrant

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Respect to Its Broadband Services, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (*AT&T Title II and Computer Inquiry Forbearance Order*); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (*ACS Dominance Forbearance Order*); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (*Embarq Title II and Computer Inquiry Forbearance Order*); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (*Qwest Title II and Computer Inquiry Forbearance Order*). This petition refers to these orders collectively as the *Enterprise Broadband Forbearance Orders*.

in the EVPL market, Embarq must provide EVPL via general tariff, except in those limited geographic areas where Embarq has pricing flexibility that enables it to negotiate contract tariffs covering those areas.

At the other end of the spectrum, legacy CenturyTel is subject to price cap regulation for all services in all areas. It has no ability to diverge from the rates, terms and conditions in its generally available tariffs, except through the laborious and time-consuming process of modifying its tariff -- a process that is not suitable for meeting the unique demands of particular customers in today's intensely competitive market for these services.

As discussed below, this disparate regulation has had a significant, negative impact on enterprise broadband customers. These regulatory constraints preclude CenturyLink from offering those customers the simple, tailored arrangements they seek. In fact, these regulatory variances have also prevented CenturyLink from realizing some of the synergies inherent in the CenturyTel/Embarq and CenturyLink/Qwest mergers. These include, in particular, the potential to expand Qwest's enterprise and government business to compete more effectively against larger, more established players in the enterprise broadband market, including leaders AT&T and Verizon.[10]

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[10] *See In the Matter of Applications filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4198 ¶ 6 (2011) (*CenturyLink-Qwest Merger Order*).

C. CenturyLink Seeks Forbearance for Its Enterprise Broadband Services that Are Still Subject to Dominant Carrier Regulation and the *Computer Inquiry* Tariffing Obligation.

Consistent with section 1.54(a)(3) and (4) of the Commission's rules,[11] CenturyLink identifies the services and geographic areas for which the requested forbearance is sought. CenturyLink seeks to rationalize the regulation of its enterprise broadband services by extending to all of its enterprise broadband services the forbearance that the Commission granted for Embarq and Qwest in 2007 and 2008, respectively.[12]

The specific services for which CenturyLink is seeking forbearance are listed and described in Attachment A. They include Ethernet-Based Services, Frame Relay Services, ATM Services, Video Transmission Services and Optical Network Services. With the exception of two Embarq services, all of the services identified in Attachment A are offered by legacy CenturyTel.

Each of these services fits within the definition of enterprise broadband services the Commission employed in the *Enterprise Broadband Forbearance Orders*: (1) existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) existing non-TDM-based optical transmission services.[13] CenturyLink seeks this relief throughout its ILEC service territories.

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[11] 47 C.F.R. § 1.54(a)(3), (4).

[12] *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd 19478; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd 12260.

[13] *See, e.g., AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18705 ¶ 12.

D. CenturyLink Seeks Forbearance from the Same Requirements from which the Commission Relieved Petitioning ILECs in the *Enterprise Broadband Forbearance Orders.*

Consistent with section 1.54(a)(1) and (e)(1),[14] CenturyLink identifies the rules and requirements from which forbearance is sought. In the *Enterprise Broadband Forbearance Orders*, the Commission granted forbearance from application of the following regulatory requirements to the specified services covered by those orders:

- Dominant carrier tariff filing and price cap regulations, including the duty to file cost support;[15]
- Dominant carrier discontinuance requirements;[16]
- Dominant carrier domestic transfer of control requirements;[17] and
- *Computer Inquiry* tariffing requirements.[18]

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[14] 47 C.F.R. § 1.54(a)(1), (e)(1).

[15] *See* 47 U.S.C. §§ 203, 204(a)(3); 47 C.F.R. §§ 61.31-61.59. *See also AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18726 ¶ 36, 18729 ¶ 42.

[16] *See* 47 C.F.R. §§ 63.71. *See also, AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18726-27 ¶ 37; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19498-99 ¶ 36; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12282 ¶ 40.

[17] *See* 47 C.F.R. § 63.03. *See also AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18726-27 ¶ 37; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19498-99 ¶ 36; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12282 ¶ 40.

[18] *Amendment of Section 64.702 of the Commission's Rules and Regulations,* 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *See also AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18735-36 ¶¶ 59-62; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19505-06 ¶¶ 50-55. In the AT&T and Qwest orders, the FCC also granted forbearance from application of BOC-specific *Computer Inquiry* requirements to those enterprise broadband services, except to the extent they imposed the same

CenturyLink seeks the same forbearance here for the enterprise broadband services listed in Attachment A. Consistent with section 1.54(c) of the Commission's rules,[19] Attachment B identifies pending proceedings in which CenturyLink has taken a position regarding relief that is identical to, or comparable to, the relief sought in this petition.

III. THE COMMISSION SHOULD ACT ON THIS PETITION PURSUANT TO DELEGATED AUTHORITY

This petition should not be controversial. CenturyLink seeks the same forbearance for the same types of services that the Commission addressed in the *Enterprise Broadband Forbearance Orders*. In those orders, the Commission addressed all relevant issues of law and fact underlying this petition. Specifically, it found that:

- There are numerous competing providers of enterprise broadband services nationwide, and the marketplace generally appears highly competitive.[20]
- The purchasers of these services are sophisticated and likely to be aware of, and take advantage of, the alternatives available to them.[21]

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transmission access or nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services. *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18733-35 ¶¶ 53-58; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12288-90 ¶¶ 54-60. Since this petition requests forbearance only for CenturyLink's Embarq and CenturyTel affiliates, those BOC-specific requirements are not relevant here.

[19] 47 C.F.R. § 1.54(c).

[20] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18719-20 ¶ 23; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19491-92 ¶ 22; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12275-76 ¶ 26.

[21] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

- Non-ILEC competitors can economically deploy OCn-level facilities and rely on TDM-based loops (in addition to their own facilities) to provide packetized broadband services.[22]

- The contribution of tariffing requirements, and the accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is negligible.[23]

- OCn-level facilities produce revenue levels that can justify the high cost of loop construction, and customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.[24]

- Continuing to apply dominant carrier regulation to the specified enterprise broadband services would create market inefficiencies, inhibit carriers from responding quickly to rivals' new offerings and impose other unnecessary costs. In contrast, detariffing these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individual needs, and enable the ILEC to respond quickly and creatively to competing service offers.[25]

- Dominant carrier regulation of an ILEC's enterprise broadband services makes it unnecessarily difficult for it to negotiate nationwide arrangements tailored to the needs of large enterprise customers with geographically dispersed locations, because

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22 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720-22 ¶¶ 25-26; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19493-95 ¶¶ 24-25; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12277-78 ¶¶ 28-29.

23 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723-24 ¶ 30; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 29; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279-80 ¶ 33.

24 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496-97 ¶ 31; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280 ¶ 35.

25 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

its tariff filings necessarily provide competitors with notice of its pricing strategies and competitive innovations.[26]

- The Commission's pricing flexibility rules do not provide sufficient regulatory relief to allow an ILEC to meet its customers' needs and compete effectively.[27]

- Eliminating dominant carrier tariffing and pricing requirements with respect to an ILEC will make the ILEC a more effective competitor for enterprise broadband services, which in turn will increase even further the amount of competition in the marketplace.[28]

- Forbearance from the application of dominant carrier regulation to these services also will promote the public interest by furthering the deployment of advanced services.[29]

- Forbearance from the application of dominant carrier tariffing and pricing regulation to an ILEC's existing enterprise broadband services satisfies each of the three requirements for forbearance in section 10(a);[30]

- Forbearance from the application of (i) dominant discontinuance requirements, (ii) dominant domestic transfer of control requirements and (iii) *Computer Inquiry*

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[26] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18730-31 ¶ 46; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19503 ¶ 45; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12286-87 ¶ 49.

[27] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725-26 ¶ 34; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19497-98 ¶ 33; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12281 ¶ 37.

[28] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18726 ¶ 35; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19498 ¶ 34; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12282 ¶ 38.

[29] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18731 ¶ 47; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19503-04 ¶ 46; *Qwest Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 12287 ¶ 50.

[30] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723-27 ¶¶ 30-37, 43, 46; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496-98 ¶¶ 29-35, 19502 ¶ 42, 19503 ¶ 45; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279-82 ¶¶ 33-39.

tariffing requirements to an ILEC's existing enterprise broadband services satisfies each of the three requirements for forbearance in section 10(a);[31]

These findings were upheld by the D.C. Circuit on appeal.[32]

Under the Commission's rules, the Common Carrier Bureau possesses ample authority to address CenturyLink's petition for forbearance on delegated authority. The petition presents no "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines."[33] In the time since the Commission's prior forbearance orders, the market for these services has become only more competitive. The Commission can, and reasonably should, treat this petition as a "me-too" petition, suitable for decision on delegated authority.

IV. UNDER ANY REASONABLE MEASURE, CENTURYLINK IS ENTITLED TO THE REQUESTED FORBEARANCE

In 2010, the Commission established a new analytical framework to evaluate Qwest's petition seeking forbearance from certain Commission regulations in the Phoenix Metropolitan

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[31] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720-22 ¶¶ 25-26, 18735-36 ¶¶ 59-62; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19493-95 ¶¶ 24-25, 19505-06 ¶¶ 51-54; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12277-78 ¶¶ 28-29. *See also Qwest Title II and Computer Inquiry Forbearance Order,* 23 FCC Rcd at 12289 ¶¶ 56-59 (forbearing from BOC-specific *Computer Inquiry* requirements, except to the extent they impose the same transmission access or nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services).

[32] *Ad Hoc Telecomm'ns Users Committee v. FCC*, 572 F.3d 903 (2009).

[33] 47 C.F.R. §§ 0.91(m); 0.291(a)(2). Indeed, the Commission has granted forbearance petitions on delegated authority in the past. *See, e.g., SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Relief in Relation to the Provision of Nonlocal Directory Assistance Services*, Memorandum Opinion and Order, 18 FCC Rcd 8134 (Wireline Comp. Bur. 2003); *Petition of Bell Atlantic for Forbearance from Section 272 Requirements in Connection with National Directory Assistance Services,* Memorandum Opinion and Order, 14 FCC Rcd 21484 (Comm. Car. Bur. 1999).

Statistical Area.[34] The Commission has given no indication that this framework applies to petitions such as this.[35] Nor does CenturyLink believe it should, particularly given the Commission's previous determinations in the *Enterprise Broadband Forbearance Orders*.[36] In an abundance of caution, however, CenturyLink demonstrates in this section that it is entitled to the requested forbearance under any reasonable standard. This demonstration is preceded by a discussion of the applicable product and geographic markets.

A. Product Market.

In the *Enterprise Broadband Forbearance Orders*, the Commission analyzed the state of competition for these services as a group. That continues to be the proper approach given that there is not a stand-alone market for any of these services, but rather a wider market for higher-capacity services provided to enterprise customers through various technologies. In short, the evolving nature of enterprise broadband services makes it appropriate to evaluate these services

[34] *Petition of Qwest Corporation for Forbearance to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010).

[35] *See Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Order Analytic Framework in Similar Proceedings*, 25 FCC Rcd 8013, 8014 (2010) (seeking comment on the application of the analytic framework to "other similar requests for regulatory relief, including the pending remands of the *Verizon 6-MSA Forbearance Order* (WC Docket No. 06-172) and the *Qwest 4-MSA Forbearance Order* (WC Docket No. 07-97)"). The Commission has previously noted the dissimilarities between the *Verizon 6-MSA Order* and the *Enterprise Broadband Forbearance Orders* that would warrant use of a "similar type of market analysis" in the two types of orders. FCC Brief, *Ad Hoc,* at 34 (filed Sept. 17, 2008) (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706(a), 47 U.S.C. § 157).

[36] Qwest also filed a challenge in the Tenth Circuit of the Commission's analytical framework in the *Phoenix Forbearance Order*. *Qwest Corporation v. FCC* (10^{th} Cir. No. 10-9543). That appeal remains pending.

"broadly."[37] Growing demand and technological changes are causing legacy services, such as Frame Relay and ATM, to be supplanted by newer services, such as IP, Ethernet and MPLS-based broadband services.[38] Thus, a provider's market share for a particular service at a particular time has little bearing on the actual state of competition, given that providers can use other services to provide the same broadband transmission capabilities. The Commission recognized these facts in the *Enterprise Broadband Forbearance Orders*, concluding that it should not give much weight to static market share information, given the "emerging and evolving nature" of the enterprise broadband market.[39]

As noted below, CenturyLink has provided estimated market share data for providers of enterprise broadband services. There is no reason to believe that CenturyLink's position in the marketplace is materially different with respect to any of the individual services covered by this

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[37] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

[38] *See* Roopashree Honnachari, Frost & Sullivan, *Demystifying Carrier Ethernet Services: No One Size Fits All*, BCS 5-02, at 1 (Apr. 6, 2011) (noting that Ethernet has "emerged as an attractive service option for customers migrating from ATM, Frame Relay, SONET and Private Line services") (Attachment C).

[39] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18719-20 ¶ 23; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19491-92 ¶ 22; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12275-76 ¶ 26. *See also Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules, Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16460-61 ¶ 39 (2007) (*Section 272 Sunset Order*) (recognizing that market share calculations alone can "significantly overstate" a party's market position, particularly considering "other market factors that may affect market power.").

petition. For all these services, CenturyLink is just one of numerous national providers, and holds a small fraction of the market for these services.

B. Geographic Market.

Consistent with applicable precedent, the Commission employed a national market analysis in the *Enterprise Broadband Forbearance Orders*. While each customer location can be considered a separate relevant geographic market, administrative convenience has led the Commission typically to aggregate customers facing similar competitive choices.[40] In the *Enterprise Broadband Forbearance Orders*, the Commission concluded that for packet-switched broadband and optical transmission services it is appropriate "to look more broadly at competitive trends without regard to specific geographic markets," because the market for these broadband services is "emerging and changing."[41] In further support, the Commission noted that "many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences."[42]

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40 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19 n.72; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

41 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18716-17 ¶ 20; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23.

42 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19490-91 ¶ 20; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12274 ¶ 24.

The Commission therefore decided that it should analyze market conditions on a "national basis."[43] This decision accords with the way the Commission has consistently and repeatedly analyzed the evolving marketplace for broadband services. For example, in the *Cable Modem Order* and *Wireline Broadband Order*, the Commission relied on national market conditions in concluding that cable modem and DSL transmission services should be free of common carrier requirements, even though the availability of those broadband services varied widely across local geographic areas.[44] Similarly, the Commission considered competitive conditions at the national level in deciding that ILECs should not be required under sections 251

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[43] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21 n. 87; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19490-91 ¶ 20 n.79; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12272-73 ¶ 23 n. 86. *See also* FCC Brief, *AdHoc*, at 23 ("a nationwide approach is particularly appropriate for broadband markets, such as [for enterprise broadband services], that are emerging and changing").

[44] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4799-4800 ¶ 1, 4802 ¶ 6, 4802-04 ¶ 9, 4831 ¶ 56 (2002) (*Cable Modem Order*); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14880-81 ¶ 50, 14901-03 ¶¶ 91-94 (2005) (*Wireline Broadband Order*).

and 271 to unbundle high-capacity broadband facilities for their competitors.[45] Each of these determinations was upheld on appeal.[46]

This approach also is consistent with CenturyLink's experience. Enterprise customers typically seek broadband services for large geographic areas, including on a nationwide basis. They frequently solicit bids through requests for proposal (RFPs) for service to numerous locations throughout the country, in order to command better prices and minimize the expense of managing their telecommunications suppliers.[47] Of CenturyLink's approximately 270 commercial agreements for enterprise broadband services, more than half are with customers with a national presence.[48] In recent years, for example, wireless providers have issued numerous RFPs of regional or national scope for Ethernet services used to provide backhaul services to their cell sites. In some cases, wireless providers have sought service for hundreds or

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[45] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17128 ¶ 248, 17148 ¶ 286 (2003) (*Triennial Review Order*) (subsequent history omitted); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21502 ¶ 12, 21504 ¶ 19 (2004).

[46] *See Brand X*, 545 U.S. 967, 1001, 1002 (2005) (ultimately affirming *Cable Modem Order*); *Time Warner Telecom*, 507 F.3d 205 (3d Cir. 2007) (upholding *Wireline Broadband Order*); *United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004) (affirming *Triennial Review Order*'s elimination of unbundling requirements for OCn facilities); *Earthlink, Inc. v. FCC*, 462 F.3d 1, 8-9 (D.C. Cir. 2006) (affirming forbearance from section 271 unbundling requirements for high-capacity facilities).

[47] Declaration of Emily Binder ¶¶ 2, 6, appended as Attachment D (Binder Declaration).

[48] *Id.* ¶ 6.

even thousands of cell sites -- in a single transaction, with uniform rates, terms and conditions.[49] To successfully bid for such business, CenturyLink typically must agree to serve all of the customer's locations dispersed throughout CenturyLink's ILEC footprint or even the entire country. One of CenturyLink's chief selling points is that it has a broad service territory that is not limited to metropolitan areas.[50] Other providers similarly market and provide their enterprise broadband services on a national, or even global, basis.[51]

Even if a carrier lacks facilities to provide services in a particular location or on a particular route, these high-end services provide sufficient revenue to justify the construction of facilities necessary to provide these services. The Commission has found that "the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers' own networks."[52] Given these

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[49] *Id.*

[50] *Id.* ¶ 5.

[51] *See, e.g.,* AT&T at http://www.business.att.com/enterprise/Service/network-services/ethernet/wide-area-vpls/ ("Wide Area Ethernet service from AT&T offers a global reach to connect your locations and applications"); Verizon at http://www.verizonbusiness.com/Products/networking/access/ethernet/ ("Our Ethernet Access services can connect your network environments around the world"); tw telecom at http://www.twtelecom.com/telecom-solutions/voice-solutions/business-ethernet-services/ (Extended Native LAN "expands your metro Business Ethernet connectivity across the country"). (Websites last visited on Feb. 17, 2012.)

[52] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23 (citing *Triennial Review Order*, 18 FCC Rcd at 17063 ¶ 129); *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

considerations, there is no reason to depart from the Commission's sound approach in the *Enterprise Broadband Forbearance Orders* of analyzing market conditions on a national basis.

C. Competitive Analysis.

As the Commission has found on multiple occasions, the marketplace for enterprise broadband services includes all the characteristics of intense competition: myriad providers offering alternatives to ILEC services; the incentive and ability for providers to extend their networks to new locations in response to a request for even a single circuit; and customers that are well aware of the alternatives available to them and willing to exercise their considerable bargaining power to obtain favorable terms suited to their particular needs. CenturyLink is far from dominant in that marketplace.

1. The Enterprise Broadband Marketplace Is "Highly Competitive".

As the Commission has found, there is extensive competition in the provision of enterprise broadband services. Five years ago, the Commission concluded that the marketplace for packet-switched broadband and optical transmission services appeared to be "highly competitive."[53] It further noted that "[t]here are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC's service territory. These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-

[53] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33. *See also Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

added resellers providing services that compete against [the petitioners]."[54] Even customers with "more regional or localized operations . . . are able to solicit telecommunications services from a range of potential providers."[55] In addition, "systems integrators, and equipment vendors and value-added resellers" impose additional competitive pressure in the marketplace by selling the routers and other equipment and services necessary to permit large customers to create their own enterprise broadband solutions.[56]

In the intervening years, that market has become even more competitive. Indeed at least 30 providers offer enterprise broadband services nationally or to large areas of the country.[57] For example, every major cable provider now competes aggressively for enterprise customers.[58] Attachment E illustrates the numerous national and regional providers of enterprise services operating throughout the country today.

Enterprise broadband services also frequently bring in sufficient revenues to justify self deployment. In the *Enterprise Broadband Forbearance Orders*, the Commission found that

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[54] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718-19 ¶ 22. *See also Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19491 ¶ 21 (citations omitted); *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12274-75 ¶ 25.

[55] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21. *See also Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19490-91 ¶ 20; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12274 ¶ 24.

[56] *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5707-08 ¶ 80 (2007).

[57] *See* Attachment E.

[58] *See, e.g.,* Time Warner Cable at http://www.twcbc.com/; Charter Communications at http://www.charterbusiness.com/data-networking.aspx?type=large; Comcast at http://business.comcast.com/smb/services/ethernet. (Websites last visited on Feb. 13, 2012.)

"competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services in [Embarq's and Frontier's] incumbent LEC service areas."[59] The Commission further found that "OCn-level facilities produce revenue levels that can justify the high cost of loop construction."[60] Large enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.[61] Indeed, the Commission found nearly a decade ago that requesting carriers are not impaired without access to OCn or SONET interoffice transport at TELRIC rates.[62]

Where they choose not to deploy their own fiber facilities, potential providers also can rely on CenturyLink's special access and UNE services to provide enterprise broadband services. In the *Enterprise Broadband Forbearance Orders*, the Commission considered and rejected Time Warner Telecom's contention that wholesale TDM-based loops, *i.e.*, DS1 and DS3 special

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59 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720-21 ¶ 25; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19493-94 ¶ 24, 19496-97 ¶ 31; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12277 ¶ 28. *See also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2634 ¶ 183 (2005) (*Triennial Review Remand Order*) (subsequent history omitted) (recognizing that there is "substantial deployment of competitive fiber loops at the OCn capacity" and that "competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them.").

60 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496-97 ¶ 31; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280 ¶ 35; *Triennial Review Order*, 18 FCC Rcd at 17169 ¶ 316.

61 *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496-97 ¶ 31; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280 ¶ 35.

62 *Triennial Review Order*, 18 FCC Rcd at 17168 ¶ 315, 17221 ¶ 389.

access circuits, cannot in many instances be used as an input to provide packetized broadband services such as Ethernet.[63] That finding was upheld by the D.C. Circuit on appeal.[64]

Likewise, CLECs can use, and are using, UNE loops to provide DSL-based Ethernet services at an even lower cost than TDM-based special access services. Over the past 12 to 18 months, CLECs have successfully launched and marketed "Ethernet-over-copper" services in numerous areas served by CenturyLink -- including some "Tier 2" and "Tier 3" cities.[65] For instance, Integra Telecom uses Ethernet-over-copper technology to provide a package of voice, data and Internet services with up to 30 Mbps of symmetrical upstream and downstream bandwidth.[66] Integra markets this Ethernet service primarily to small and medium businesses as a cost-effective, scalable alternative to the enterprise broadband services provided by ILECs and cable companies.[67] Integra is in the process of launching a 100 Mbps Ethernet-over-copper service through a partnership with Overture Networks and also offers VPN and Multi-Protocol Label Switching (MPLS) services.[68]

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[63] *AT&T Title II Forbearance Order*, 22 FCC Rcd at 18721-22 ¶ 26; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12277-78 ¶ 29.

[64] *Ad Hoc Telecomm'ns Users Committee v. FCC*, 572 F.3d 903.

[65] *See* Declaration of Ryan Schwertner ¶ 3, appended as Attachment F (Schwertner Declaration).

[66] Integra website at http://www.integratelecom.com/services/business_connect.php (Website last visited on Feb. 13, 2012); Schwertner Declaration ¶ 4.

[67] Schwertner Declaration ¶ 4.

[68] Integra website at http://www.integratelecom.com/services/VPN_Solutions.php; http://www.fiercetelecom.com/story/integra-telecom-puts-overture-work-its-ethernet-over-copper-network/2011-08-22; Schwertner Declaration ¶ 4 (Websites last visited on Feb. 13, 2012).

Because these services rely on unbundled copper loops purchased at TELRIC rates, the CLECs' cost structure typically is much lower than for fiber-based ILEC broadband services, which frequently require the extension of fiber optic cable to customer locations.[69] Integra has used this cost advantage to gain large numbers of business customers in areas served by CenturyLink and become a leading provider of data services to "mid market" customers in Phoenix, Minneapolis, Seattle, Denver and Portland.[70] Other CLEC providers of Ethernet-over-copper services include EarthLink Business, MegaPath, Windstream and XO.[71] As the Commission has stated, "the elimination of dominant carrier regulation of the ILECs' Ethernet inputs cannot harm the competitive provision of Ethernet service that does not use the ILECs' Ethernet inputs."[72]

2. CenturyLink Is Not a "Dominant" Provider of Enterprise Broadband Services.

CenturyLink is nowhere close to being a dominant provider of enterprise broadband services. According to Vertical Systems Group, CenturyLink had only an 8.5 percent share of U.S. Broadband Data service revenues in 2010.[73] This put CenturyLink far behind market

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[69] Schwertner Declaration ¶ 5.

[70] *Id.* ¶ 6.

[71] *See* EarthLink at http://www.earthlinkbusiness.com/_static/_files/_pdfs/EC-MPLS-over-Ethernet.pdf; MegaPath at http://www.megapath.com/data/ethernet/benefits/; Windstream at http://www.windstreambusiness.com/resources/product-information/ethernet-over-copper; XO at http://www.xo.com/SiteCollectionDocuments/business-services/data-and-internet-services/ethernet-solutions/Ethernet_PS.pdf. (Websites last visited Feb. 13, 2012.)

[72] FCC Brief, *AdHoc*, at 25. The availability of UNE loops would not be affected by the grant of this petition.

[73] Vertical Systems Group, *Business Broadband Share Analysis* at 2 (Jan. 2012), appended as Attachment G. "Business broadband services" includes Private Line services above DS3

leaders AT&T and Verizon, and less than 2 percent ahead of Sprint, with other providers accounting for nearly 25 percent of total revenues for these services.[74]

CenturyLink holds a similarly small position with regard to Ethernet, one of today's most highly sought enterprise broadband services. According to Frost & Sullivan, CenturyLink was only the *fourth* largest provider of retail Ethernet services (after AT&T, Verizon and tw telecom)[75] and the *fifth* largest provider of wholesale Ethernet services (after AT&T, Verizon, Level 3 and Cogent) in 2010.[76] CenturyLink garnered less than 10% of revenues for these services -- hardly the mark of a dominant provider.[77] A more recent ranking places CenturyLink in sixth place for U.S. business Ethernet services at the end of 2011, behind AT&T, Verizon, tw telecom, Cox and XO.[78] While nine service providers (including Time Warner Cable, Level 3

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capacity, Frame Relay, ATM, Dedicated IP VPN, and Business Ethernet services. CenturyLink's estimated revenue share includes the revenues of legacy Qwest, Embarq, CenturyTel and Savvis. "Other" providers include EarthLink Business, Frontier, Level 3, tw telecom, Windstream and XO. *Id.*

[74] *Id.*

[75] Frost and Sullivan, *Retail Carrier Ethernet Services Market Update, 2011* at 77 (August 2011) (Attachment H).

[76] Frost and Sullivan, *Wholesale Carrier Ethernet Services Market Update, 2011* at 55 (July 2011) (Attachment I).

[77] *Id.*

[78] Vertical Systems Group: *2011 U.S. Business Ethernet Leaderboard, Ethernet Port Base Rises 31% in 2011 on Solid Market Demand and More Competitive Service* Pricing (Feb. 13, 2012), available at http://www.verticalsystems.com/prarticles/stat-flash-02-2012-Year-End%202011_Leaderboard_prnews.html (Website last visited Feb. 14, 2012).

and Cogent) hold four percent or more of billable Ethernet port installations, more than twenty others deliver Ethernet services in the U.S.[79]

Enterprise customers are "increasingly utilizing Ethernet services for domestic and international WAN networking as migration from packet services and private line services accelerates, and for metro-area connectivity."[80] Ethernet "is a scalable, reliable and cost-efficient transport service, and has hence emerged as an attractive service option for customers migrating from ATM, Frame Relay, SONET and Private Line services."[81] And there are "more flavors of Ethernet available today in the market as compared to three years ago, which provides business customers with more choices."[82] In 2011, "'[h]igh speed service availability and decreased pricing were major market drivers.'"[83]

As legacy Qwest previously discussed in detail, the ongoing, nationwide rush to upgrade backhaul services for wireless cell sites vividly illustrates the intense competition that

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[79] Additional providers include Abovenet, American Telesis, Bright House Networks, Charter, Cincinnati Bell, Comcast Business, Expedient, FiberLight, Frontier, Integra, Lightower, Masergy, Megapath, NTT America, Optimum Lightpath, Orange Business, Reliance GlobalCom, Sidera Networks, SuddenLink, Virtela, Windstream and Zayo Group, as well as others. *Id.*

[80] Nav Chandler, IDC, *U.S. Carrier Ethernet Services 2011-2015 Forecast*, IDC #231257, at 1 (Nov. 2011) (Attachment J).

[81] Roopashree Honnachari, Frost & Sullivan, *Demystifying Carrier Ethernet Services: No One Size Fits All*, BCS 5-02, at 1 (Apr. 6, 2011).

[82] *Id.*

[83] Vertical Systems Group: *2011 U.S. Business Ethernet Leaderboard, Ethernet Port Base Rises 31% in 2011 on Solid Market Demand and More Competitive Service* Pricing (Feb. 13, 2012), available at http://www.verticalsystems.com/prarticles/stat-flash-02-2012-Year-End%202011_Leaderboard_prnews.html (quoting Rick Malone, principal at Vertical Systems Group) (Website last visited Feb. 14, 2012).

characterizes the marketplace for enterprise broadband services, and CenturyLink's lack of dominance in that marketplace.[84] Over the past few years, the telecommunications industry has witnessed an exponential increase in the backhaul needs for wireless networks, due to the rapid transition from narrowband, voice-centric services to bandwidth-hungry data applications, such as streaming video.[85] As a result, wireless providers have increasingly turned to the use of broadband enterprise services, such as Ethernet, to meet the demand for increased bandwidth.[86] Wireless providers are therefore in the midst of upgrading the backhaul capacity for the vast majority of their cell sites.[87] Already, wireless providers have issued RFPs to provide high-capacity backhaul services to a large percentage of these cell sites. Qwest has faced substantial competition in responding to these RFPs from CLECs, cable companies and fiber wholesalers.[88]

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[84] Letter from Jonathan Nuechterlein, Counsel for Qwest, to Marlene H. Dortch, Secretary, WC Docket No. 05-25 (filed Oct. 26, 2010) (Cell Site Backhaul Ex Parte).

[85] This "large-scale 'mass migration' of wireless backhaul from TDM to Ethernet" is a significant contributing factor to the "particularly rapid growth" of Ethernet services. Insight Research Corporation, *Carriers and Ethernet Services: Public Ethernet in Metro and Wide Area Networks 2011-2016*, at 7 (Aug. 2011) (Attachment K).

[86] The drivers of the "frenetic growth" in this area "include the combination of radically increased mobile data bandwidth demands brought on by the proliferation of smartphones, along with the rapid and widespread transition from TDM to Ethernet to provide the necessary backhaul at lower unit costs and with greater flexibility than the older technology." Insight Research Corporation, *Carriers and Ethernet Services: Public Ethernet in Metro and Wide Area Networks 2011-2016*, at 78 (Aug. 2011).

[87] Cell Site Backhaul Ex Parte at 2. "Bandwidth levels to cell sites will . . . continue to grow dramatically as they have already -- typically doubling or tripling from 10 Mbits or multiples as this market emerged in 2009 to averaging 50 Mbits and more today." Insight Research Corporation, *Carriers and Ethernet Services: Public Ethernet in Metro and Wide Area Networks 2011-2016*, at 78 (Aug. 2011).

[88] Cell Site Backhaul Ex Parte at 2. Analysts have found that this "[g]reater competition among vendors, as well as competing backhaul platforms, is creating downward pricing pressures for backhaul service providers; which, in turn, is impacting their revenues and profitability." Frost

Sprint has confirmed this experience, expecting to end up with "'25 to 30 significant backhaul providers'" in its first round of backhaul contracts, "that will likely be a mix of incumbent LECs, cable MSOs and alternative carriers, all of whom will be expected to deliver Ethernet predominately over fiber for Sprint's new multi-mode network."[89]

Consistent with Commission precedent, there are two main reasons the broadband backhaul marketplace has become so competitive.[90] First, cell sites with high traffic volumes produce sufficient demand to justify the deployment of Ethernet or another high-capacity service, thereby attracting multiple bids.[91] Second, when a wireless provider transitions from

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& Sullivan, *U.S. Mobile Backhaul Services Market: Wireless Service Provider Spending Trends*, BCS5-8, at 6 (Oct. 2011) (Attachment L).

[89] Carol Wilson, Light Reading, *Sprint To Reveal Backhaul Contract Winners Friday* (Oct. 5, 2011), available at http://www.lightreading.com/document.asp?doc_id=213050 (quoting Sprint VP of Roaming and Access Planning Paul Schieber). The availability of alternative backhaul providers has significantly reduced Sprint's backhaul costs, leading to "a very much improved cost structure." *Sprint 4G Strategy/Network Update – Final*, FD (Fair Disclosure) Wire, Transcript 100711a4207432.732 (Oct. 7, 2011).

[90] *See, e.g., AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25 ¶ 32 (finding that "there is substantial deployment of competitive fiber loops at OCn capacity[,] . . . that competitive carriers are often able to economically deploy these facilities to large enterprise customers [and] that OCn-level facilities produce revenue levels that can justify the high cost of loop construction.") (footnotes omitted), *aff'd, Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903 (DC Cir. 2009); *Triennial Review Order*, 18 FCC Rcd 16978, 17063 ¶ 276 (noting that CLECs and ILECs "largely face the same obstacles in deploying overbuild FTTH loops [such as] obtain[ing] materials, hir[ing] the necessary labor force, and construct[ing] the fiber transmission facilities[, and] that the revenue opportunities associated with deploying any type of FTTH loop are far greater than for services provided over copper loops."), *aff'd in relevant part and vacated in other respects*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[91] In 2010, a Commission staff paper reported that "mobile data demand is expected to grow between 25 and 50 times current levels within 5 years." FCC Staff Technical Paper, *Mobile Broadband: the Benefits of Additional Spectrum* at 5 (Oct. 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302324A1.pdf.

narrowband to broadband backhaul facilities, CenturyLink generally enjoys no advantage over its competitors in deploying fiber to that provider's cell sites, even if it already provides backhaul to those cell sites by means of legacy copper facilities. To replace copper with fiber, CenturyLink must do what any competitive provider must do: it must hire work crews to lay new conduit and fiber. Moreover, even where existing conduit can be used to deploy new fiber, CenturyLink's competitors can use that same conduit on favorable regulated terms. The result is that CenturyLink and its rivals face essentially the same costs to deploy broadband backhaul solutions to cell sites, and each provider competes on a level playing field. This is generally true any time a customer is transitioning to a fiber-based enterprise broadband service.[92]

Taken together, these facts demonstrate CenturyLink's far-from-dominant position in the provision of enterprise broadband services. Dominant carrier regulation of CenturyLink's enterprise broadband services is therefore unwarranted -- especially given that all other significant providers of these services are regulated as nondominant in their provision of these services throughout the nation.

V. THE REQUESTED FORBEARANCE FROM DOMINANT CARRIER REGULATION EASILY SATISFIES EACH OF THE REQUIREMENTS OF SECTION 10

In order to grant the petition, the Commission must find that the requested forbearance would satisfy the three requirements in section 10(a): that the applicable regulations are not necessary to ensure that the enterprise broadband services in question are provided on a just and reasonable and not unjustly or unreasonably discriminatory basis; that those regulations are not

[92] As noted, CLECs that deploy copper-based Ethernet services will enjoy an even lower cost structure to provide enterprise broadband services.

necessary to protect customers; and that the requested forbearance is in the public interest. CenturyLink's requested forbearance from dominant carrier regulation easily satisfies each of these requirements.

A. Dominant Carrier Regulation Is Not Necessary To Ensure that These Enterprise Broadband Services Are Provided on a Just, Reasonable and Nondiscriminatory Basis.

Section 10(a)(1) of the Act requires the Commission to determine whether dominant carrier regulation of the enterprise broadband services in question is necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with that . . . telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory."[93] Given intense competition for these services, and CenturyLink's market position with respect to these services, dominant carrier regulation is both unnecessary and counterproductive. As the Commission has found, "'so long as competitive choices remain' for retail enterprise services, large enterprise 'customers should seek out best-priced alternatives,' limiting the ability of a provider 'to raise and maintain prices above competitive levels.'"[94] Under these circumstances, "mandating that [CenturyLink], but not [its] nondominant competitors, comply with requirements that limit the ability of customers to secure the most

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[93] 47 U.S.C. § 160(a)(1).

[94] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720-21 ¶ 25; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19493-94 ¶ 24 (citing ATT*/BS Order; SBC/ATT Order, Verizon/MCI Order, Q Section 272 Sunset Order*); *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12277 ¶ 28.

flexible service arrangements is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services."[95]

The Commission has also found that continued application of its dominant carrier *discontinuance rules* to an ILEC's enterprise services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as the ILEC is subject to the same treatment as nondominant carriers in relation to those services.[96] That same conclusion applies here.

1. Purchasers of Enterprise Broadband Services Exert Significant Bargaining Power.

The sophistication of enterprise customers further reduces any need for dominant carrier regulation. The Commission has consistently recognized that enterprise customers "demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge."[97] These customers "are likely to make informed choices based on expert advice about

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[95] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18715 ¶ 17; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19488 ¶ 16; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12271 ¶ 20.

[96] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18726-27 ¶ 37; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19498-99 ¶ 36; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12282 ¶ 40.

[97] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

service offerings and prices . . . [and] are likely to be aware of the choices available to them."[98] Frequently, these customers have numerous competitive choices. As the Commission has noted, "the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own networks where possible, and to carry the traffic of these customers over the suppliers' own network."[99] Enterprise customers use this availability of alternative providers to obtain more favorable arrangements for themselves. They routinely solicit competitive bids using RFPs, followed by lengthy and intense negotiations over every material term and condition of service.[100]

These findings are all consistent with CenturyLink's experience in marketing and providing enterprise broadband services. The purchasers of CenturyLink's enterprise broadband services share certain common characteristics: they are knowledgeable about telecommunications services; they are aware of the alternatives available to them, both in terms of alternative services and alternative providers, including over their own facilities; and they are adept at using those alternatives to obtain more favorable rates, terms and conditions in their negotiations with CenturyLink.[101] In one recent situation, a customer issued an RFP and received bids for thousands of locations from numerous providers. The customer then compiled a

[98] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

[99] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19492-93 ¶ 23; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12276-77 ¶ 27.

[100] *SBC Communications Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18332 ¶ 74 & n.226 (2005).

[101] Binder Declaration ¶ 12.

spreadsheet reflecting the lowest bid for each location, and shared the spreadsheet with each competing bidder, offering the customer's business if the bidder could beat that lowest price.[102] Such customers are willing to engage in extended negotiations, with multiple providers if necessary, to meet their particular business needs.[103]

2. The Burdens Imposed by Dominant Carrier Regulation of Enterprise Broadband Services Exceed Any Potential Benefits of Such Regulation.

The Commission has long noted the inefficiency of tariffing, particularly in a competitive market.[104] Dominant carrier regulation "'is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from [an incumbent LEC's] control of any bottleneck access facilities that [the incumbent LEC's] competitors must access in order to provide competing services.'"[105] Conversely, the contribution of tariffing requirements, and the

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[102] *Id.* ¶ 13.

[103] *Id.* ¶ 14.

[104] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934 as amended*, Second Report and Order, 11 FCC Rcd 20730, 20744 ¶ 23 (1996) (*IXC Forbearance Order*); *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272*, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5213 ¶ 9 (2007) (*Qwest Section 272 Sunset Forbearance Order*). *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33 ("[T]he Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals' new offerings, and impose other unnecessary costs."); *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

[105] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18727-28 ¶ 39; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19500 ¶ 38 (citing *ACS Dominance Forbearance Order* ¶ 111); *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12283 ¶ 42; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233 ¶ 52).

accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is "*negligible*."[106]

Dominant carrier regulation prevents a carrier from "responding efficiently and in a timely manner to market-based pricing promotions, including volume and term discounts, or special arrangements offered by competitors."[107] Tariffing and cost support requirements limit a carrier's ability to negotiate service arrangements tailored to specific customer needs and to respond to new service offers from unregulated competitors because it must provide advance notice of any tariff price changes.[108] In CenturyLink's experience, advance notice of its tariff changes allows competitors to counter innovative product and service offerings even before they are made available to the public.[109] In general, competitors typically set their "list" price at a certain amount, such as 10 percent, below CenturyLink's tariffed rate.[110]

This is the case even with respect to contract-based tariffs authorized under the Commission's pricing flexibility rules. While these arrangements enable CenturyLink to tailor services through individually negotiated arrangements, the Commission's rules still require these

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[106] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723-24 ¶ 30 (emphasis supplied); *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 29; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279-80 ¶ 33.

[107] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18730-31 ¶ 46; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12286-87 ¶ 49.

[108] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280-81 ¶ 36.

[109] Binder Declaration ¶ 25.

[110] *Id.*

contract-based tariffs to be filed with specified information "that is available publicly to any party, including competitors."[111]

The Commission has repeatedly recognized the benefits of eliminating tariff obligations for enterprise broadband services. Detariffing these services "will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs."[112] Eliminating these tariff obligations will also make CenturyLink a more effective competitor for these services, which it in turn will increase even further competition in the marketplace.[113]

B. Dominant Carrier Regulation of These Enterprise Forbearance Services Is Not Necessary to Protect Consumers.

Section 10(a)(2) of the Act requires the Commission to determine whether dominant carrier regulation of CenturyLink's enterprise services is necessary to protect consumers.[114]

Dominant carrier regulation is not necessary for the protection of consumers in this context. As discussed in detail above, these regulations actually hinder, instead of protect, consumers' interests, because they make it more difficult for consumers to secure the

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[111] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725-26 ¶ 34; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19497-98 ¶ 33; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12281 ¶ 37.

[112] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19497 ¶ 32; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12280-81¶ 36.

[113] *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18726 ¶ 35; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19498 ¶ 34; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12282 ¶ 38.

[114] 47 U.S.C. § 160(a)(2).

individualized service offerings they seek.[115] The "one size fits all" tariff offerings are particularly ill-suited for responding to RFPs for multiple locations.[116] Purchasers of these services tend to have highly-varied individual needs and preferences, while a tariff typically has a single standard set of rates, terms and conditions that cannot easily be modified given the cumbersome tariff process. These standardized offerings pale in comparison to the customized arrangements that customers can obtain from CenturyLink's nondominant competitors and therefore place CenturyLink at a competitive disadvantage.[117]

National purchasers of enterprise broadband services also frequently seek uniform rates, terms and conditions. For example, many wholesale providers prefer uniform rates because they allow them easily to determine their cost of providing service in a particular area or to a particular location. If the customer is unsure where its demand is likely to grow, varied pricing makes it much more difficult for the customer to develop its business case.[118] Customers' preference for uniform rates directly conflicts with the disparate regulation that currently applies to CenturyLink's ILEC affiliates, and frequently requires the customer to purchase via tariff from CenturyTel and Embarq and by commercial agreement from legacy Qwest, potentially with different rates, terms and conditions in all three. If a customer seeks a uniform rate, sometimes the best CenturyLink can do is offer a "composite" rate, whereby the customer would pay the

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[115] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28, 19502 ¶ 42; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279 ¶ 32.

[116] Binder Declaration ¶ 15.

[117] *Id.*

[118] *Id.* ¶ 16.

tariffed rate for the service where required and a lower rate in other areas, such that, on average, the customer will pay the negotiated composite rate for the service. While satisfactory to some customers, that approach adds unnecessary complexity both for the customer and CenturyLink.[119] Moreover, for smaller customers, this option often is not available, especially if their request for service is limited to areas where CenturyLink is subject to full tariffing obligations.[120]

However, some customers refuse even to consider such arrangements and therefore take their business elsewhere. In 2010, for example, legacy CenturyLink lost a bid to provide Ethernet services in a number of metropolitan areas in response to an RFP issued by a national carrier. In subsequent feedback, the customer complained about the lack of uniformity in CenturyLink's rates, the complex and confusing rate structure used to mimic uniform pricing and the general difficulty of doing business with CenturyLink relative to its peers.[121]

In theory, CenturyLink can modify or add tariff provisions to adapt to customer-specific requirements, and CenturyLink has used this approach on occasion. This approach falls short for three reasons, however. *First*, modifying or supplementing a tariff requires significant work and time -- typically numerous steps requiring two to three, and sometimes several, months to complete. Few customers are willing to wait that long to begin taking service, and such delays make it virtually impossible to respond to competitor's promotional offerings or competing terms in areas subject to tariffing obligations.[122] *Second*, no matter how quickly CenturyLink modifies

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[119] *Id.* ¶¶ 17-18.

[120] *Id.* ¶ 20.

[121] *Id.* ¶ 19.

[122] *Id.* ¶¶ 21-23.

its tariffed offerings, its competitors often quickly adjust their prices to remain 10 percent below CenturyLink's tariffed rate.[123] *Third*, it is difficult to develop a tariffed offering that appropriately limits the availability of that offering to similarly situated customers. In another recent situation, a wholesale customer sought a price below CenturyTel's tariffed rate. Because CenturyTel lacks any pricing flexibility, it was unable to meet the customer's request without lowering the rate for all customers. In this way, dominant carrier regulation resulted in the customer paying a higher rate than it would have if CenturyTel were regulated as a nondominant carrier. Given that CenturyLink's nondominant competitors frequently peg their rates to CenturyLink's tariffed rates, as discussed, dominant carrier regulation generally results in higher rates for all customers.

In contrast, nondominant regulation fosters vigorous price competition for enterprise broadband services. As the Commission has found, customers benefit from "the ability of all competitors to respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages."[124] Indeed, since 2007, legacy Embarq and Qwest have entered into approximately 270 commercial agreements with enterprise broadband purchasers of all sizes, resulting in average price reductions of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent. Particularly for larger customers, these agreements have been negotiated one-by-one, taking account of specific customer needs in ways that could never be accomplished in a standard tariff offering. The

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[123] *Id.* ¶ 25.

[124] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28; *Qwest Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 12279 ¶ 32.

requested forbearance will further benefit customers. With its enterprise broadband services uniformly classified as nondominant services, CenturyLink will be able to develop companywide offerings at uniform rates, terms and conditions, as demanded by customers.[125]

CenturyLink is not seeking forbearance from any public policy obligations with respect to its enterprise services, such as those related to 911, emergency preparedness, customer privacy or universal service. The requested relief therefore will have no impact on these regulations.

C. Forbearance from Dominant Carrier Regulation of these Enterprise Services Is Consistent with the Public Interest.

Section 10(a)(3) of the Act requires the Commission to determine whether forbearance from dominant carrier regulation of the enterprise broadband services in question is consistent with the public interest.[126]

The requested forbearance will further the public interest in three important respects. *First*, it will facilitate investment in broadband facilities and extend the reach of wired and wireless broadband services, which can lead to innumerable public interest benefits.[127] Today, "there remain areas of the country where people live, work, and travel that lack even basic mobile voice coverage, and many more areas that lack mobile broadband coverage."[128] Given its

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[125] Binder Declaration ¶¶ 26-28.

[126] 47 U.S.C. § 160(a)(3).

[127] "Ubiquitous and affordable broadband can unlock vast new opportunities for Americans, in communities large and small, with respect to consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes." Joint Statement on Broadband, GN Docket No. 10-66, Joint Statement on Broadband, 25 FCC Rcd 3420, 3421 ¶ 3 (2010).

[128] *USF/ICC Transformation Order* ¶ 8.

significant rural profile, CenturyLink is uniquely qualified to help deliver the benefits of broadband to widely dispersed areas.

For example, CenturyLink's Ethernet backhaul services can play a key role in enabling wireless providers to expand mobile broadband coverage to areas where it is not available today. CenturyLink's expansive local network and robust long haul facilities allow the company to help wireless providers quickly upgrade their cell sites to meet escalating demands for additional bandwidth. At the same time, however, lingering dominant carrier regulation prevents CenturyLink from entering into the simple, customized arrangements that wireless providers seek, which in turn slows down the negotiation and contracting process, ultimately delaying the rollout of broadband services. Grant of the petition will eliminate these regulatory hindrances and permit CenturyLink to meet the needs of wireless providers and their end user customers.

As the Commission has noted, "the ability to negotiate in an unencumbered fashion is not only essential to enable competition in the broadband market but to encourage investment in, and development of, new broadband services [and] . . . these requirements impose significant unnecessary transactions costs on petitioners' broadband business."[129] With the requested forbearance, CenturyLink's enterprise broadband services would be subject to the same baseline Title II regulation that applies to its competitors (except for Verizon, which is subject to Title I regulation for these services). By regulating CenturyLink on the same terms as its nondominant competitors, the Commission "will encourage all potential investors in broadband network

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[129] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279 ¶ 32.

platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions."[130] Thus, the requested forbearance will also further the goals of section 706 and 7(a) of the Act, which established a national policy of "encourage[ing] the provision of new technologies and services to the public."[131]

Second, the requested forbearance will eliminate "outmoded" and "excessively burdensome" regulatory provisions, consistent with the Commission's implementation of Executive Order 13579. In July 2011, President Obama directed independent regulatory agencies to develop a plan for promoting "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[132] In November, the Commission issued a preliminary plan for retrospective analysis of its existing rules, consistent with the Executive

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[130] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19504 ¶ 48; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12288 ¶ 52.

[131] 47 U.S.C. § 157(a). *See also AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18731 ¶ 47; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19503-04 ¶ 46; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12287 ¶ 50. In adopting the *Enterprise Broadband Forbearance Orders*, the Commission "'heeded Congress's direction to 'utiliz[e]' its section 10 'regulatory forbearance' power to 'encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.'" FCC Brief, *Ad Hoc,* at 1 (citing Telecommunications Act of 1996, Pub. L No. 104-104, 110 Stat. 56, § 706(a), 47 U.S.C. § 157).

[132] Executive Order 13579, *Regulation and Independent Regulatory Agencies*, 76 Fed. Reg. 41587 § 2 (July 14, 2011).

Order.[133] In that plan, the Commission identified three factors for determining whether a regulation is "ripe" for retrospective analysis:

(1) The regulation "has been affected by changes in technology or new scientific research or changes in market structure";

(2) The regulation "has a disproportionate or undue burden on particular entities, has caused unintended negative effects, or could result in greater net benefits to the public if modified"; and

(3) The regulation "has been subject to frequent requests for waivers by affected stakeholders or been identified by the public as needing revision."[134]

The dominant carrier regulations in question undoubtedly satisfy each of these criteria: profound "changes in market structure" have resulted in more than 30 national or regional providers of enterprise broadband services; the regulations in question have a "disproportionate" and "undue burden" on CenturyLink and ultimately its customers, and have caused the "unintended negative effect[]" of preventing CenturyLink from entering into the simple, individualized arrangements that these customers seek; and these requirements have been the subject of "frequent requests for waivers," in the form of forbearance petitions that the Commission has repeatedly granted.

Third, the requested forbearance will enhance competition by permitting CenturyLink to leverage the synergies inherent in the CenturyTel-Embarq and CenturyLink-Qwest mergers. The requested forbearance will enable CenturyLink to compete more effectively in the provision of enterprise broadband services and eliminate the "market distortions that asymmetrical regulation

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[133] Preliminary Plan for Retrospective Analysis of Existing Rules (rel. Nov. 7, 2011).

[134] *Id.* at 7.

. . . causes."[135] As described above, continuing dominant carrier regulation of some CenturyLink enterprise broadband services makes it difficult for the company to compete effectively in the provision of these services. Large enterprise customers frequently seek individualized nationwide arrangements covering geographically dispersed locations. CenturyLink cannot satisfy these requests through the tariffing process without significant difficulty,[136] particularly because the company's tariff filings provide competitors with notice of our pricing strategies and new offerings.

Post-merger CenturyLink has the breadth of services and geographic scope to compete effectively against large nationwide competitors, such as AT&T, Comcast and Verizon. As noted, one of CenturyLink's key selling points is its extensive geographic reach -- both in metropolitan and rural areas -- particularly given the synergies inherent in the CenturyTel-Embarq and CenturyLink-Qwest mergers.[137] Today, however, CenturyLink is hobbled with burdensome tariffing regulations that make it exceedingly difficult to offer large enterprise customers the same types of individually-tailored product suites that its competitors provide in normal course.[138] Ultimately, customers will benefit from the ability of all competitors to

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135 *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18730-31 ¶ 46; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19503 ¶ 45; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12286-87 ¶ 49.

136 Binder Declaration ¶ 22.

137 *Id.* ¶¶ 4-5.

138 *Id.* ¶¶ 15-24.

respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages.[139]

While the Commission's pricing flexibility rules offer some flexibility, it is not sufficient to meet customers' demand for these services. By definition, pricing flexibility is geographically limited and available only in particular areas in which certain triggers are satisfied. Thus, pricing flexibility does not enable CenturyLink to enter into the nationwide arrangements frequently sought by purchasers of enterprise broadband services.[140]

VI. THE COMMISSION SHOULD ALSO FORBEAR FROM THE *COMPUTER INQUIRY* TARIFFING REQUIREMENT WITH RESPECT TO THESE SERVICES

In the *Enterprise Broadband Forbearance* orders, the Commission forbore from the requirement to offer, pursuant to tariff, the basic transmission services underlying an ILEC's enhanced services. CenturyLink seeks that same relief with respect to its enterprise broadband services that are currently subject to dominant carrier regulation. CenturyLink does not seek forbearance from the remaining *Computer Inquiry* rules that apply to other facilities-based providers, including nondominant providers.[141]

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[139] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279 ¶ 32.

[140] As noted these contract-based tariffs also suffer from all the harms of any tariffing requirement, in terms of enabling competitors to adjust their prices in response to CenturyLink's rate changes. *See IXC Forbearance Order*, 11 FCC Rcd at 20744 ¶ 23.

[141] The *Computer Inquiry* rules require that these providers (a) offer as telecommunications services the basic transmission services underlying their enhanced services, and (b) offer those telecommunications services on a nondiscriminatory basis to all enhanced service providers, including their own enhanced services operations. *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18735 ¶ 59; *Embarq Title II and Computer Inquiry*

As the Commission previously found, and for the reasons discussed above, competitive pressures for these services are sufficient to satisfy the requirements of section 10(a) with respect to the tariffing requirements in the *Computer Inquiry* rules.[142] In addition, these tariffing requirements present the same problems as dominant carrier tariffing requirements: (1) they undermine competition by enabling CenturyLink's rivals to anticipate CenturyLink's rate changes, while hobbling CenturyLink's ability to respond to competitors' promotions, and (2) they prevent enterprise broadband customers from obtaining the individualized arrangements that they seek.

VII. CONCLUSION

For the foregoing reasons, the Commission should grant the requested forbearance. This action will further the critical goals articulated in the National Broadband Plan, by empowering CenturyLink to meet the needs of its enterprise broadband customers, including mobile broadband providers. The requested forbearance also will eliminate outmoded and unduly burdensome regulatory requirements, consistent with the Commission's plan for implementing Executive Order 13579.

Grant of the petition would be fully consistent with the Commission's precedent. As the Commission found in the *Enterprise Broadband Forbearance Orders*, the benefits of dominant

Forbearance Order, 22 FCC Rcd at 19505 ¶ 51 (citing *Computer II Final Decision*, 77 FCC 2d at 474-75 ¶ 231); *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12263-64 ¶ 6 and nn. 22, 23, 26 & 27.

[142] *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18735 ¶ 60, 18735-36 ¶ 62; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19505 ¶ 52, 19505-06 ¶ 54; *Qwest Title II and Computer Inquiry Forbearance Order*, 23 FCC Rcd at 12279-80 ¶¶ 32-35 and notes accompanying this text.

carrier regulation of enterprise broadband services today are "negligible," while the harms of that regulation are substantial. Given intense competition for these services, CenturyLink is in no way a dominant provider of these services, nor could it sustain rates that are unjust, unreasonable or discriminatory. Well aware of the choices available to them, sophisticated purchasers exercise significant bargaining power to obtain the individualized, yet uniform, geographically widespread arrangements that they typically seek.

The requested forbearance will permit CenturyLink to offer these arrangements across its footprint, as its nondominant competitors can already do today. Forbearance therefore will enable CenturyLink to compete more effectively against market leaders, such as AT&T and Verizon, thus realizing the promise of the CenturyTel-Embarq and CenturyLink-Qwest mergers. Ultimately, this translates into more choices for customers, individually tailored serving arrangements to meet their unique needs and increased investment in broadband services and facilities.

Respectfully submitted,

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